

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: PETITION OF US LEC
TENNESSEE, INC. FOR DECLARATORY
ORDER

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) DOCKET NO. 02-00890
) IN RE: PETITION OF US LEC
) TENNESSEE, INC. FOR DECLARATORY
) ORDER
DOCKET ROOM

**RESPONSE OF AIRSTREAM WIRELESS SERVICES TO US LEC OF TENNESSEE,
INC.'S PETITION FOR DECLARATORY ORDER**

In response to US LEC of Tennessee, Inc.'s ("US LEC") Petition for Declaratory Order, Airstream Wireless Services ("Airstream") does hereby specially appear, by and through counsel, for the particular purpose of determining whether the Tennessee Regulatory Authority ("TRA") possesses jurisdiction over the subject matter, and would respectfully state as follows:

AFFIRMATIVE DEFENSES

Pursuant to TRA Rule 12-1-2-.03(2)(a), Airstream raises the defense that the TRA does not possess jurisdiction over the subject matter in the case at hand.

RESPONSE TO US LEC'S PETITION FOR DECLARATORY ORDER

FACTS

1. Airstream is a corporation duly organized and existing under the laws of the State of Delaware and doing business in Tennessee with its principal offices located at 1000 June Road, Memphis, Tennessee, 38119.
2. US LEC is, upon information and belief, a Delaware corporation having its principal place of business at Harpeth on Green V, 105 Westwood Place, Suite 100, Brentwood, Tennessee, 37027.

3. On or about April 11, 2002, Airstream and US LEC entered into an Advantage Customer Service Agreement (the "Agreement") which provides that US LEC agrees to provide international long distance service to Airstream at the agreed upon prices contained in the Agreement. (A true and correct copy of the Agreement is attached hereto as Exhibit "A").

4. The Agreement provides that service to the UK and to Germany shall be \$.06 cents per minute. In consideration for such rates, Airstream agreed to a \$40,000.00 minimum monthly usage commitment.

5. Upon entering an Agreement with a carrier such as US LEC, Airstream then binds itself to an agreement identical or near identical with its customers. Any breach of the Agreement by a carrier such as US LEC can and does result in substantial harm and injury to a company such as Airstream and may subject Airstream to substantial liability to its customers.

6. Airstream was a relatively new business operating in Tennessee for only a short period of time and was in the process of building its client base. Airstream only maintained the one contract with US LEC for international long distance services. Airstream did not have any other immediate means to provide its customers with service.

7. US LEC began providing service to Airstream on or about June 10, 2002. Airstream is without sufficient knowledge to attest to what carrier US LEC partners with to carry such calls to Europe. Airstream can neither admit nor deny that US LEC was contacted by the Fraud Division of their major international carrier on July 17, 2002.

8. On or about July 24, 2002, US LEC terminated service to Airstream. Upon learning of the disconnection of service, Mr. Jason Braverman, CEO of Airstream, immediately contacted Rod Bain ("Bain"), the Director of Sales and authorized agent of US LEC, regarding

the termination of such service. Mr. Bain also requested that Bob Stanton participate in the telephone conference.

9. At the conclusion of this telephone conference, Mr. Braverman understood that US LEC would provide a minimum of sixty (60) days notice of any proposed change in rate for service, as required by the Agreement. (See Addendum to the Agreement, ¶ II).

10. During such conversation on July 24, 2002, US LEC, represented by Rod Baine and Bob Stanton, was willing and proposing to renegotiate the Agreement by increasing the agreed upon rates for international long distance service in the Agreement. (Affidavit of Braverman, ¶ 4). (A copy of the Affidavit of Jason Braverman was filed in the Chancery Court of Shelby County on August 13, 2002, and is attached hereto as Exhibit "B").

11. As of July 26, 2002, neither Airstream nor Mr. Braverman received any notice of any proposed rate change as required by the Agreement and service was not restored, thereby resulting in Airstream's inability to perform under its contracts to provide long distance service to its customers.

12. On July 30, 2002, Airstream filed suit against US LEC for money damages and requested the Chancery Court of Shelby County, Tennessee to issue a temporary restraining order ("TRO") enjoining US LEC from refusing to provide service to Airstream pursuant to the terms of the Agreement at issue in this matter.

13. On July 30, 2002, this Court issued a TRO enjoining US LEC from refusing to provide service to Plaintiff pursuant to the terms of the Agreement.

14. However, US LEC did not restore service as required by the TRO. Instead, US LEC filed an "Emergency Motion to Dissolve Temporary Restraining Order and to Dismiss."

15. As a consequence of US LEC's failure to abide by the Chancery Court's TRO, Airstream filed a Motion to Show Cause why US LEC should not be held in contempt for violating such TRO. These matters were scheduled before the Court on August 27, 2002, whereby the parties agreed to stay those proceedings and defer the issue of jurisdiction to the TRA.

LAW AND ARGUMENT

A. PROPER JURISDICTION FOR THIS CASE RESIDES WITH THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE, NOT THE TENNESSEE REGULATORY AUTHORITY.

(1) Airstream did not expressly submit to the jurisdiction of the Tennessee Regulatory Authority.

Although US LEC does not allege that Airstream expressly submitted to the jurisdiction of the TRA, Airstream states that neither the Agreement nor the tariff incorporated in the Agreement provides that the parties submit to the jurisdiction of the TRA to hear any matter arising out of the Agreement at issue in this case.

(2) This Case Does Not Arise Out of the Tennessee Telecommunications Act.

US LEC alleges that the facts of this case require an interpretation of its tariff filed with the TRA and the TRA's rules, more specifically Section 2.5.5(E) of US LEC's tariff which states:

In the event of fraudulent use of the Company's network, the Company will discontinue service without notice and/or seek legal recourse to recover all costs involved in enforcement of this provision.

US LEC alleges that this provision contained in its tariff on file with the TRA authorizes it to discontinue service without notice to any customer if the company reasonably believes that the service is being used for a fraudulent purpose. (See ¶ 2 of US LEC's Petition for Declaratory Order). The plain wording of the tariff states: "In the event of fraudulent use of the Company's

network, the Company will discontinue service without notice ..." This provision does not state that, upon reasonable belief or a suspicion that the traffic patterns of its customers are the result of fraudulent activity or a fraudulent scheme, US LEC can terminate service without notice or without performing any type of investigation into the alleged fraudulent scheme.

In the case at hand, US LEC alleges that service was terminated to Airstream because US LEC believed that its network was being used for a fraudulent purpose or scheme. However, US LEC failed to provide any proof or any evidence to substantiate their alleged belief that its network was being used to commit a fraudulent scheme. In fact, US LEC's actions contradict such a belief. Mr. Braverman, CEO of Airstream, states in his Affidavit that US LEC, through its representatives, was willing and proposing to renegotiate the Agreement by increasing the agreed upon rates in the Agreement. (Exhibit "B". Affidavit of Braverman, ¶ 4). It makes absolutely no sense that US LEC would attempt to renegotiate the prices in the Agreement and then permit Airstream to continue in a scheme which US LEC, by its own allegation, reasonably believed was fraudulent. Once again, US LEC's actions completely contradict its claim and defense for terminating service to Airstream. To allow US LEC to operate under this provision of its tariff in the manner which US LEC has done, without substantiating any proof or even providing any indication that there was a fraudulent scheme, allows US LEC to cripple companies such as Airstream. Therefore, it is not US LEC's tariff or the TRA rules which require interpretation, but rather, an analysis of US LEC's actions under the circumstances of this case which must be done.

Upon analyzing the gravamen of the real issues in this matter, it is clear that the TRA does not have jurisdiction over this matter and that this matter does not arise out of the Tennessee Telecommunications Act (the "Act") or require an interpretation of tariffs and TRA

Rules. US LEC alleges that it terminated service to Airstream because Airstream's traffic patterns were the result of deliberate manipulation and likely being done for a fraudulent purpose. (Affidavit of Mike Moeller, ¶ 9). (A copy of the Affidavit of Mike Moeller was filed on August 6, 2002, in the Chancery Court of Shelby County and is attached hereto as Exhibit "C") (Mike Moeller is the Vice President-Sales for Tennessee and Kentucky at US LEC Corp.). US LEC does not contend that using a switch to separate, based on the number being called, calls made to land line telephones and routing all wireless calls to US LEC or that using auto dialers to dial repeatedly to wireless telephones are illegal or fraudulent acts. If the fact that Airstream's traffic patterns, which US LEC alleges reflected that 99.1% of the calls from Airstream were being made to wireless telephones, was fraudulent, US LEC would have never attempted to re-negotiate the rates of original Agreement with Airstream to allow Airstream to continue doing business in the same manner only at a higher rate.

US LEC essentially alleges two types of fraud in this matter. First, the US LEC alleges that upon learning that the traffic patterns of Airstream indicated 99.1% of its minutes were being terminated to wireless telephones, that such traffic patterns were indicative of fraudulent activity. In this instance, the fraudulent activity alleged by US LEC primarily means that a customer is running up substantial minutes for which it does not intend to pay. In the case at hand, Airstream clearly intended to pay for all minutes it used. After speaking with Mr. Braverman on July 24, 2002, the US LEC was aware that Airstream intended to pay for the minutes used at the rates contained in the Agreement.

The second allegation of fraud originates from US LEC's contention that Airstream fraudulently induced it into entering the Agreement. US LEC alleges that Airstream represented to it that no more than 10% to 15% of calls would be terminated to wireless telephones.

However, Mr. Braverman stated, in his Affidavit, that there were no such representations made. (Affidavit of Braverman, ¶ 5). Additionally, the Agreement does not contain any provision which indicates that such restrictions were in place on service. Furthermore, US LEC is confronted with a parol evidence issue in its attempt to prove that Airstream made these alleged representations which were not reflected in the Agreement. Either instance of US LEC's allegations of fraud are exactly the type of matters that a Chancery Court has jurisdiction to hear.

In its attempts to illustrate the alleged fraudulent activities, US LEC alleges that someone was using a switch to separate, based on the numbers being called, calls made to wireless telephones from calls made to land line telephones and routing all wireless calls to US LEC or using auto dialers, or similar equipment, to dial repeatedly to wireless telephones. (Exhibit "C". Affidavit of Mike Moeller, ¶ 9). US LEC states that this abnormal traffic pattern is the result of deliberate manipulation and is likely being done for fraudulent purpose. (Affidavit of Moeller, ¶ 9). However, US LEC has failed to provide any evidence or explanation what the fraudulent purpose may be. US LEC alleges that it was concerned about a pattern of activity which, it felt, could evidence an intent not to pay for the contracted service. What US LEC is really concerned about is the fact that it sold for six cents per minute service which, as it turns out cost US LEC much more. This point is evidenced by the Affidavit of Mike Moeller who expressly states the true underlying reason why service was terminated by US LEC. In his Affidavit, Mr. Moeller states that, "If US LEC is required to restore services to Airstream, US LEC will lose approximately \$12,000.00 per day ..." (Affidavit of Moeller, ¶ 11).

Upon terminating the service and learning that there was no fraudulent scheme, US LEC was then obligated to restore service pursuant to the terms of the Agreement. US LEC's actions and course of dealings with Airstream completely contradict their argument and defense in this

matter that there was a fraudulent scheme. US LEC states that it terminated Airstream's service because the traffic patterns were indicative of fraud. However, after speaking with Mr. Braverman on July 24, 2002, US LEC, represented by Rod Baine and Bob Stanton, was willing and proposing to re-negotiate the Agreement by increasing the agreed upon rates in the Agreement. (Affidavit of Braverman, ¶ 4). US LEC's actions to attempt to re-negotiate the wireless rates pursuant to the Agreement and then allow Airstream to continue operating in the same manner at a higher rate is not consistent with its reasoning for terminating service to Airstream. US LEC's actions fly in the face of the defense it is using to avoid its obligations pursuant to the terms of the Agreement.

Thus, the real gravamen of this case is so clearly summarized in paragraph 7 of the Affidavit of Mike Moeller, whereby Mr. Moeller states that during negotiations with Airstream, Airstream represented to US LEC that no more than 10% to 15% of international traffic would be made to wireless telephones. (Affidavit of Moeller, ¶ 7). The real gravamen of this case is that US LEC contends that they were fraudulently induced to enter the Contract with Airstream. Therefore, this matter does not arise out of the Act, but rather, is a common law suit based on a claim for breach of contract by Airstream and a counter-claim or defense based on fraudulent inducement to enter such contract by US LEC. Again, US LEC would have never attempted to modify the Agreement and renegotiate the rates in the Agreement if Airstream's actual traffic was fraudulent or illegal. Therefore, this case neither requires an interpretation by the TRA of US LEC's tariffs, the TRA rules, or an analysis of whether any communications laws were being violated.

(3) This Case is not a Regulation Case Normally Heard by the TRA.

Finally, this is not the type of case within the jurisdiction of the TRA or the type of case normally heard by the TRA. In its Petition for Declaratory Order, US LEC cites to *BellSouth*

Advertising & Publishing Corp. v. Tennessee Regulatory Authority, 2002 Westlaw 1473208 (Tenn. 2002) (petition to rehear pending) (A copy of the *BellSouth* decision is attached hereto as Exhibit "D"), whereby the court refers to Section 1 of Chapter 408 of the Tennessee Public Acts where the General Assembly outlined the public policy underlying the new regulatory scheme which, as stated earlier, altered in a most significant manner the telecommunications industry in Tennessee:

Declaration Of Telecommunication Services Policy. The General Assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications service markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn. Code Ann. § 65-4-123 (Supp. 2001).

Further, the cases cited by US LEC in its argument that the TRA has original jurisdiction over this matter are very distinct from the case at hand. The *BellSouth* case involved competition issues whereby the court determined that the TRA had the authority to order a publisher to include competitors' names and logos on the directory covers of the white pages. *BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Authority*, 2002 Westlaw 1473208 (Tenn. 2002). The court in *BellSouth* stated that one of the more notable changes affected by the enactment of Tenn. Pub. Acts 408 (effective June 6, 1995) which comprehensively reformed the rules under which providers of telephone services operate in Tennessee was the abolition of monopolistic control over the local telephone service market and the initiation of open-market competition in the provision of local telephone service. *BellSouth* at p. 1.

US LEC also cites to *Breeden v. Southern Bell Tel. & Tel. Co.*, 199 Tenn. 203, 285 S.W.2d 346 (Tenn. 1955), whereby one of the issues before that court was whether the Commission (now the present day TRA) could require a telephone company to provide service to people in a community. The case was rooted in discrimination and whether a telecommunications company had to provide services to a certain community. The *Breeden* court took note of and referred to *McCollum v. Southern Bell Tel. & Tel. Co.*, 163 Tenn. 277, 43 S.W.2d 390, whereby the Court previously stated:

The legal profession has generally so construed the Act, and we think there can be no doubt but that the Legislature intended to confer upon the commission (present day TRA) exclusive jurisdiction, in the first instance, to establish reasonable rates and charges.

The court in *Breeden* added that the same language is applicable to its case. *Breeden*, 285 S.W.2d at 351. Before the telephone company can be required to serve the people of the community such as the one at issue in *Breeden*, the Railroad and Public Utilities Commission must hear the matter and grant the necessary certificate therein. This case required a statutory interpretation and is very distinct from the present matter which does not require any similar interpretation.

The cases cited by US LEC in support of its argument that the TRA has original jurisdiction over this matter are all very distinguishable from the case at hand. The cases cited by US LEC all involve issues of competition, discrimination, determinations whether initial service should be provided to a community, and statutory interpretation of the TRA's own rules and statutory provisions. The case at hand involves no issues even remotely similar to the ones in the cases cited by US LEC.

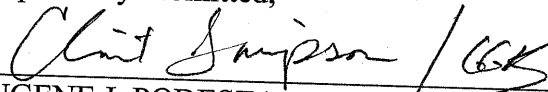
CONCLUSION

The TRA does not have jurisdiction in the case at hand. This case does not arise out of the Tennessee Telecommunications Act and does not require an interpretation of US LEC's tariff or the TRA rules.

However, if the TRA does determine that the issues involved in this matter do fall within its jurisdiction, then Airstream requests that the TRA find that US LEC did not act properly when it terminated service to Airstream. US LEC provided no evidence and has failed to offer any factual support that it terminated service to Airstream as a result of the fraudulent use of its network. US LEC did not act reasonable when terminating service to Airstream and continued to act in bad faith by not restoring service to Airstream upon learning that Airstream was not defrauding US LEC.

Based on these facts, Airstream requests that the TRA (1) deny US LEC's Petition for Declaratory Order; (2) issue an order stating that the TRA does not have jurisdiction in this matter, that the issues presented before the TRA do not arise out of the Tennessee Telecommunications Act; or in the alternative; (3) issue an order stating that US LEC did not properly terminate service to Airstream on July 24, 2002.

Respectfully submitted,



EUGENE J. PODESTA, JR. (#9831)

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Attorneys for Respondent

Airstream Wireless Services

OF COUNSEL:

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CERTIFICATE OF SERVICE

I, Clint Simpson, hereby certify that I have served a true and exact copy of this Response of Airstream on Luther Wright, Esquire, Esq., Boulton, Cummings, Conners & Berry, PLLC, 414 Union Street, Suite 1600, P. O. Box 198062, Nashville, Tennessee, 37219, this the 23rd day of September, 2002.

Clint Simpson / CGB
CLINT SIMPSON